Supreme Court, U.S.
FILED
SEP.
19 1980
MICHAEL RODAK, JR., CLERK

NO. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Edward Thomas Schilling
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202
414/276-1122
and
Ernst J. von Briesen
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202
Counsel for Petitioners

of counsel:
VON BRIESEN & REDMOND, S.C.
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

NO. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Edward Thomas Schilling, on behalf of St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy submits this supplemental brief to the petition for a Writ of Certiorari to the Supreme Court of South Dakota to call to the attention of the United States Supreme Court intervening matter not available at the time of the original filing.

Page

TABLE OF CONTENTS

ADDITIONAL REASON FOR GRANTING THE PETITION

THERE IS NOW A DIRECT CONFLICT BETWEEN THE SUPREME COURT OF SOUTH DAKOTA AND A UNITED STATES COURT OF APPEALS IN DECIDING THE SUBSTANTIAL FEDERAL QUESTIONS INVOLVED 3

APPENDIX

Alabama and Nevada v. Marshall, — F.2d — (No. 79-3968 and 79-4032, 5th Cir., decision filed September 8, 1980) A-1

ADDITIONAL REASON FOR GRANTING THE PETITION

THERE IS NOW A DIRECT CONFLICT BETWEEN THE SUPREME COURT OF SOUTH DAKOTA AND A UNITED STATES COURT OF APPEALS IN DECIDING THE SUBSTANTIAL FEDERAL QUESTIONS INVOLVED.

We previously pointed out that the Supreme Courts of the States of South Dakota and North Dakota decided the federal questions involved in direct conflict with one another. (Petition for Writ of Certiorari, pp. 13 and 14)

Now there is a conflict between the decision of the Supreme Court of South Dakota and a United States Court of Appeals. On September 8, 1980, the United States Court of Appeals for the Fifth Circuit overruled the United States Secretary of Labor by holding that church elementary and secondary schools were exempt from coverage under the federal unemployment compensation laws. *Alabama and Nevada v. Marshall,* — F.2d — (No. 79-3968 and 79-4032, 5th Cir., decision filed September 8, 1980). Because this decision is not yet reported, it is set forth in the Appendix herein (Appendix, pp. A-1 - A-6)

Because of this new conflict and the extensive litigation pending throughout the nation involving the significant federal questions involved we again respectfully request

that the petition for a writ of certiorari to the Supreme Court of South Dakota be granted.

Respectfully submitted,

Edward Thomas Schilling
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202
414/276-1122
and
Ernst J. von Briesen
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202
Counsel for Petitioners

of counsel:

VON BRIESEN & REDMOND, S.C.
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202

September, 1980

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3968

STATE OF ALABAMA,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

No. 79-4032

STATE OF NEVADA,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

Petitions for Review of Orders of the
Department of Labor

(SEPTEMBER 8, 1980)

Before COLEMAN, Chief Judge, RONEY and GARZA, Circuit Judges. GARZA, Circuit Judge:

The question presented for our determination is whether the Unemployment Compensation Amendments of

1976[1] discontinued the Federal Unemployment Tax Act (FUTA)[2] exemption for employees of elementary and secondary church schools. For an understanding of the present controversy a brief review of the relevant FUTA exemptions is in order.

Prior to 1970, FUTA did not require states' unemployment compensation programs to include nonprofit organizations, such as hospitals and schools, within their unemployment compensation coverage. The Employment Security Amendments of 1970[3] required states' programs to include these organizations within their coverage, but the amendments provided two express exemptions of importance to this case. 26 U.S.C. §3309(b)(1) provided an exemption for service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

Section 3309(b)(3) provided an exemption for service performed "in the employ of a school which is not an institution of higher education."

In 1976, Congress deleted the exemption contained in §3309(b)(3) thereby requiring coverage of elementary and secondary schools. Following the 1976 amendments, Petitioners, Alabama and Nevada, modified their compensation laws to delete the corresponding exemptions within their program coverage.[4] After over a year of equivocation, the Secretary of Labor took the official position that the deletion of §3309(b)(3) required coverage of services performed in all elementary and secondary schools, including church schools. The Secretary's position was and remains that §3309(b)(1)(B) has no

application to church schools and that §3309(b)(1)(A) applies only to "those strictly church duties performed by church employees at the school pursuant to their church responsibilities."[5] Alabama and Nevada refused to follow the Secretary's interpretation of the law[6] and the Secretary instituted administrative proceedings to withhold certification of Petitioner's compensation programs. After an evidentiary hearing the Administrative Law Judge determined that the Secretary's position was erroneous and recommended that the Petitioner's programs be certified.[7] Feeling that the term "church" should be narrowly defined to include only the physical house of worship, the Secretary rejected the recommendation of the Administrative Law Judge on October 31, 1979 and the Petitioners now seek review of the Secretary's ruling.

The Petitioners contend that sectarian elementary and secondary schools remain exempt under the "plain language" of §3309(b)(1)(A) because the services performed by employees of these schools are performed in the "employ of a church." In support of their argument that church schools are within the statute's meaning of "church", the Petitioners point to the uncontradicted evidence in the administrative record showing that: many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined and fired by church representatives and officials; school buildings are owned by the church; and school employees are paid with funds drawn from the church accounts. To support their argument that employees of church schools are in fact employees of the church the Petitioners point to 26 U.S.C. §3306(a)(1) which defines "employer" and "any person who . . . paid wages." Additionally, 26 C.F.R. §31.3121(d)-1(c)(2)

(1979) explains that an employer-employee relationship exists when the employer has a right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place of work. Lastly, the Petitioners cite many cases which recognize that services performed by parochial schools are an "integral part" of the religious mission of the governing church. *NLRB v. Catholic Bishop,* 440 U.S. 490 (1979); *Meek v. Pittenger,* 421 U.S. 349 (1975); *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Although both sides of this case point to evidence of Congressional intent favoring their positions, the law is well settled that a statute must be interpreted according to its plain language unless a clear contrary legislative intention is shown. *See NLRB v. Catholic Bishop, supra; U.S. v. Apfelbaum,* — U.S. — (1980). Regarding §3309 (b) (1) (A), we can find no clear Congressional intention to desire a result contrary to its plain language. The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the "in the employ of" language of the statute, therefore, if the employees involved are employed by a "church", the exemption applies to them. Resolution of this question depends upon what is meant by "church" as used in the statute. We are convinced that the plain meaning of "church" requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its

functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary.

If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But, it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today.

Petition for Reveiw is GRANTED and the Decision of the Secretary of Labor is hereby SET ASIDE.

FOOTNOTES

[1] Pub. L. No. 94-566, 90 Stat. 2667.

[2] 26 U.S.C. §3301 *et seq.*

[3] Pub. L. No. 91-373, 84 Stat. 695.

[4] Ala. Code §25-4-10(b)(21); Nev. Rev. Stat. §612.121 (1977).

[5] Unemployment Insurance Program Letter No. 39-78 (May 30, 1978).

[6] The Alabama Department of Industrial Relations refused to comply with the Department of Labor's directive after having been enjoined to do so as a consequence of litigation of this issue in the state courts.

[7] The Administrative Law Judge relied upon both §3309 (b)(1)(A) and (B) and based his recommendation for certification on several reasons: the "plain language" of the statute; the Congressional intent and history; and the probability of state-church "entanglement". We express no opinion on the various holdings of the Administrative Law Judge, but rest our opinion solely on the "plain language" of §3309(b)(1)(A).